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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

Nos. 78-1088 and 78-1217

HENRY A. KISSINGER,
Petitioner,
v.
REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et al.*,
Respondents.
and
REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et al.*,
Petitioners,
v.
HENRY A. KISSINGER,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS MILITARY AUDIT PROJECT, *et al.*

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QUESTIONS PRESENTED

1. Was petitioner's removal from the Department of State of papers recording Departmental business a viola-

tion of his fiduciary duty, in circumstances of conflict of interest, and wrongful?

2. Did the Department of State retain its right to possession of such papers despite such a wrongful removal?

3. Did the district court have equitable power to order the return to the Department of State of records wrongfully removed, in order to effectuate the policy of the Freedom of Information Act (FOIA) and in aid of its jurisdiction to determine if records were improperly withheld?

4. Are records of conversations of the Secretary of State in which public business was transacted agency records within the definition of the FOIA?

5. Does processing by State Department officials under the FOIA, with petitioner having an express right to oppose release of private matter, violate a constitutional right of petitioner?

STATEMENT OF THE CASE

FACTS

Petitioner while Secretary of State had transcripts made of his telephone conversations (the Notes). Much of the material in the notes records public business. In January 1976 a Freedom of Information request was made for certain of the notes. The Department denied the request. In October 1976 petitioner removed the notes from his State Department office and shipped them to Vice-President Rockefeller's home in New York. In November 1976 petitioner's subordinate, the Legal Adviser, wrote a memorandum to petitioner stating that in his view the notes were petitioner's personal property and not agency records. He advised nevertheless that if

government business were recorded in the notes, such portion should be extracted for the Department's records.

Petitioner had one of his aides, Lawrence Eagleburger, a career Department official, make extracts. On December 24, 1976, petitioner executed an agreement transferring the notes to the Library of Congress. The agreement provides that petitioner and persons he personally designates or approves would have exclusive access to the notes for 25 years.[1]

On December 28, 1976, respondent[2] Military Audit Project, *et al.*, hand delivered its first Freedom of Information Act request for the notes to the State Department. The same day petitioner caused the notes to be shipped from the Rockefeller home to the Library of Congress. On January 18, 1977, the Department of State denied respondent's FOIA request, not only for the notes but also for copies and extracts the Department had retained. On January 20, 1977, petitioner left the office of Secretary of State. The Department thereafter denied respondent's FOIA appeal.

PROCEEDINGS

Respondent filed suit under the FOIA against the Department, the Library and petitioner, asking for an order granting access to the records and enjoining defendants from withholding them. A. 20a. A later request by the Reporters' Committee for Freedom of the Press, *et*

[1]The agreement recites that the donation is to the United States. The intention was a transfer to the Library for petitioner's exclusive use. Petitioner could have left the notes in the State Department if he wished to donate them to the "United States."

[2]In this brief "respondent" refers to Military Audit Project, et al. Reference to plural "respondents" refers to Military Audit Project, *et al.* and the Reporters' Committee, *et al.*, collectively.

al., also had been denied, on January 28, 1977. The Reporters' Committee also filed suit.

In the course of the proceedings respondent represented that it sought only those portions of the notes recording government business, not personal matters. Later in the proceedings the Department of State agreed not to press further its denial to respondent of access to the extracts made by Mr. Eagleburger. The extracts are to be processed under the district court's order once the present stay of that order is dissolved.

Respondent Military Audit Project, *et al.* is a party only in No. 78-1088, the petition of former Secretary Kissinger to reverse the decision of the district court and court of appeals holding that the FOIA reaches notes of his tenure as Secretary of State. Respondent is not a party to the cross-petition of the Reporters' Committee to reverse the decision that the FOIA does not reach notes of petitioner's tenure as National Security Adviser.

THE RULINGS BELOW

The district court held that the FOIA covered agency records wrongfully removed from the agency. Pet. App. 53a-55a. It held that the records sought here were agency records wrongfully removed from the State Department. *Id.* 55a-58a. It ruled that therefore they should be returned to the Department of State. *Id.* 58a.

The district court then ordered the Library of Congress to return the documents to the Department of State, to determine the extent to which disclosure was required by the FOIA. *Id.* 60a. The district court ordered that petitioner and any other persons affected should have the opportunity to object to disclosure of any material they deemed exempt on privacy grounds. *Id.* 61a. The district court retained jurisdiction of the case for the purpose

of overseeing compliance with its order. *Id.* The order has been stayed pending review by this court.

On petitioner's appeal the Court of Appeals affirmed *per curiam*. Neither the Department of State nor the Library of Congress had appealed.

SUMMARY OF ARGUMENT

The principal issue before the Court on the merits is not implication or creation of a private remedy of retrieval of removed agency records. It is, whether records removed from an agency in the circumstances of this case may still be subject to the FOIA after removal and hence subject to the reach of a district court, once its jurisdiction is invoked by a requester of documents whose request was denied. 5 U.S.C. § 552(a)(3), (4)(B).

I.

The district court had subject matter jurisdiction of the case and respondents stated a claim for relief under the FOIA. Respondent MAP's complaint invoked the district court's jurisdiction to decide whether the Department of State's denial of access to the records was an improper withholding under the FOIA. By alleging the Department's denial of access to documents which admittedly existed the complaint stated a claim for relief.

II.

The district court correctly held that petitioner's removal of the notes from the Department of State was wrongful. Pet. App. 55a, 58a. Petitioner was Secretary of State and head of the Department when he removed the notes. By statute he was custodian of the Department's papers. By removing the notes he favored his

personal interests in conflict with and over the interests of the Department. This violated his fiduciary duty as a government official.

Moreover, petitioner's wrongful act did not deprive the Department of lawful possession of the notes. As Secretary of State and a fiduciary he held the notes, and exercised dominion and control of the notes in the hands of his bailee the Library of Congress. Thus the Department of State had possession of the notes as a matter of law when respondent's request was received on December 28, 1976, and when it was denied on January 18, 1977; both dates on which petitioner was still Secretary of State. The notes are impressed with a constructive trust in favor of the Department. The Department has possession, or an undisputed right to obtain possession, today. Its denial of access to the notes is therefore a withholding within the meaning of the FOIA.

III.

The district court properly exercised equitable power to order the return of the notes to the Department. Its order properly effectuates the policy of the FOIA that all agency records be disclosed, subject only to specific exemption. The order was necessary and appropriate in aid of its jurisdiction to finally determine if the notes were improperly withheld. The court's order, providing an equitable remedy for petitioner's wrongful removal in a situation where conflict of interest was apparent, was agreeable to the usages and principles of law. 28 U.S.C. § 1651(a).

IV.

The notes are agency records. They record the business of the Department of State and the foreign policy of the United States as conducted by the highest official of

the Department, charged with these duties directly under the President. They are the original and most accurate record of these events, activities and commitments. The intent of Congress was to include such materials within the scope of the FOIA.

V.

Petitioner has no constitutional right of privacy that would be invaded by Departmental inspection of the records. Public officials give up expectations of privacy in their official conduct. This Court has approved the same kind of minimal intrusion for similar public purposes. *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977).

ARGUMENT

I.

THE DISTRICT COURT HAD SUBJECT MATTER JURISDICTION AND RESPONDENTS STATED A CLAIM FOR RELIEF UNDER THE FOIA

The FOIA confers jurisdiction "on complaint, . . . to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B). The agency's denial of a proper request for records, 5 U.S.C. § 552(a)(3), confers jurisdiction to decide if the denial was a withholding and if it was improper. Decisions whether a denial on the ground that the agency does not have the requested records is a withholding, and whether it is proper or improper, are decisions on the merits. *See, e.g., Forsham v. Califano*, 587 F.2d 1128, 1133 (D.C. Cir. 1978), *cert. granted*, No. 78-1118 (May 14, 1979) (no "right" under the FOIA to inspect raw research data in contractors' hands)

and cases cited at F. Br. 37.[3] Even an agency's plea that despite a thorough search it has found no documents responsive to the request is an issue of the merits of withholding on which proof can be required. *Founding Church of Scientology of Washington, D.C., Inc. v. National Security Agency*, No. 77-1975, slip op. at 21-30 (D.C. Cir. May 15, 1979).

Here the Department of State denied access to the notes on the grounds that they were "the Secretary's personal records," were not "agency records" and "had been transferred to the Library of Congress." A. 73a. By alleging the fact of the State Department's denial of access on these grounds, A. 18a, respondent stated a claim for relief under the FOIA. Respondent's complaint invoked the district court's jurisdiction to decide whether the notes were agency records improperly withheld, and to grant relief under the FOIA if it found they were.

As necessary first steps towards deciding whether the withholding was improper, the district court had to decide whether the notes were "wrongfully removed" from the State Department, and whether they were "agency records" or "personal records." These issues were raised by the State Department itself in its denial of access. App. 73a, 18a. The district court correctly decided those issues against the State Department and

[3]Nichols v. United States, 460 F.2d 671 (10th Cir.), *cert. denied*, 409 U.S. 966 (1972), affirmed a judgment on the merits applying the 5 U.S.C. §552(b)(3) exemption (other statute). Ciba-Geigy Corp. v. Mathews, 428 F.Supp. 523 (S.D.N.Y. 1977), granted judgment on the merits, holding that research records created by a contractor were not "agency records," applying a rule of law requiring proof of government ownership, control or use of the documents, *id.* at 529. A lower court decision that petitioner and the federal parties ignore, Tax Reform Research Group v. IRS, 419 F.Supp. 415, 425 (D.D.C. 1976), said, in reaching the merits of the propriety of an agency's denial, "that the agency may no longer be in physical possession of the records . . . is not determinative."

petitioner. Pet. App. 55a, 58a. Having decided these issues it was empowered, indeed required, to take the next step and order the notes returned to the State Department.

> Jurisdiction is defined to be the power to hear and determine the subject matter in controversy in the suit before the court, and the rule is universal, that if the power is conferred to render the judgment or enter the decree, it also includes the power to issue proper process to enforce such judgment or decree.

United States ex rel. Riggs v. Board of Supervisors, 73 U.S. (6 Wall.) 166, 187 (1867).

II.

THE DEPARTMENT OF STATE NEVER LOST LAWFUL POSSESSION, CUSTODY AND CONTROL OF THE NOTES AND ITS DENIAL OF ACCESS TO RESPONDENT WAS A WITHHOLDING UNDER THE FOIA

The Federal parties concede that the FOIA "entitles the requesting party to examine . . . agency records in the agency's possession at the time the request is made." F. Br. 37. They concede that the FOIA is violated if an agency "refuses to produce documents in its custody." *Id.* And they would concede that the district court's judgment must be affirmed if the State Department had either "possession [or] an undisputed right to obtain possession of the notes" at the time the FOIA request was made. F. Br. 38 n.26; *see also* F. Br. 18-19; Pet. Br. 28 [asserting that the FOIA "requests were filed *after* Dr. Kissinger had transferred the notes to the Library of Congress." (emphasis in original)].

The State Department indeed had possession and custody as a matter of law and an undisputed right to obtain possession of the notes when respondent's FOIA

request was delivered on December 28, 1976, and does today. The State Department's denial of access to the notes was therefore "a withholding" within the meaning of the FOIA. F. Br. 37. Accordingly, as the Federal parties concede, in this case the district court could "exercise broad equitable powers to remedy the violation, even if this means compelling production of the withheld document from a third party." F. Br. 37-38; *see id.* 18.

A.

Petitioner's Removal of the Notes Was a Violation of His Fiduciary Duty in Circumstances in Which There Was a Conflict of Interest, and Was Wrongful

This petition[4] involves papers recording petitioner's conduct of the Office of Secretary of State from September 22, 1973, when he took office, to January 20, 1977, when he left office. A. 244a. As Secretary petitioner was the head of the Department, its business, its personnel and its management. 22 U.S.C. §§ 2656, 2658, 2664. In particular he had "custody and charge . . . of all the books, records [and] papers" of the Department. 22 U.S.C. § 2657. In short he was a fiduciary, the express trustee of the Department's "records" and "papers."

The fiduciary nature of public office is long established. *United States v. Carter,* 217 U.S. 286, 306 (1910); *United States v. Podell,* 436 F.Supp. 1039, 1042 (S.D.N.Y. 1977), *aff'd,* 572 F.2d 31 (2d Cir. 1978); *cf. Crawford v. United States,* 212 U.S. 183, 191 (1909). Petitioner's removal of papers in his custody from the Department he headed was in violation of his fiduciary duty and therefore was wrongful and void.

[4]No. 78-1088.

As a fiduciary, petitioner had a duty not even to allow "himself to be placed in a position where his personal interest *might* conflict with the interests of" his principal, the Department. *Fulton National Bank v. Tate,* 363 F.2d 562, 571 (5th Cir. 1966) (emphasis in original). No man may serve two masters. *United States v. Mississippi Valley Generating Co.,* 364 U.S. 520, 549 (1961), *citing* Matt. 6:24. As a fiduciary, a government official shall not "be allowed to enter into engagements in which he . . . *can* have, a personal interest . . . which possibly *may* conflict, with the interests of those he is bound to protect." *United States v. Carter,* 217 U.S. at 306, *quoting Aberdeen R. Co. v. Blaikie Bros.,* 1 Macq. H. L. Cas. 461, 472 (emphasis added). Therefore petitioner's good faith belief that the notes were personal and not the records or papers of the Department in his official custody, Pet. Br. 5-6, is irrelevant. *Id.; County of Cook v. Barrett,* 36 Ill. App. 3d 623, 631-32, 344 N.E.2d 540, 548 (1975).[5]

Where the situation creates a potential conflict of interest it does not matter how scrupulous is the official's intent. *Cf. Board of Governors of Federal Reserve System v. Agnew,* 329 U.S. 441, 449 (1947). The law imposes "an objective standard of conduct." It recog-

[5]The familiar words of Judge (later Justice) Cardozo in Meinhard v. Salmon, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928), are most apt.

> Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of the courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions. . . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. [Citations omitted.]

nizes that "an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government." *United States v. Mississippi Valley Generating Co.*, 364 U.S. at 549. It imposes "a rigid rule of conduct . . . ." *Id.* at 551. The rule reaches the "ambiguous situation." *Cf. id.* at 557.

Here the situation was not even "ambiguous." Petitioner was aware of the Department's interest in the notes. He admits that he considered the notes "work aids." A. 245a. His work, of course, was to be Secretary of State and to manage the Department and the foreign affairs of the United States. 22 U.S.C. §§ 2656, 2658, 2664. From the time of the first FOIA request for any of the notes, in January 1976, petitioner repeatedly sought the informal advice and finally obtained the formal opinion of his subordinate, the Legal Adviser, that the notes were his personal papers, not papers of the Department. A. 247a, 80a-84a. Secretary Kissinger knew that the notes contained matter that had to remain in "the Department's official records" and had a career foreign service officer make extracts from them for the Department's official records. A. 248a.

The record more than suggests that Secretary Kissinger himself knew of the potential conflict of interest. His removal of the papers from the Department served one of two masters, his personal interest, adversely to another, the Department he headed under the President.[6] The removal was a breach of trust, and, as the district court held, wrongful.

[6]Section 208 of Title 18, U.S.C. makes it unlawful for "an officer . . . of the executive branch of the United States Government" to participate "personally or substantially as a Government officer . . . through decision, approval . . . or otherwise, in a . . . matter in which, to his knowledge, he . . . has a financial interest"

[footnote continued]

B.

Petitioner's Wrongful Removal of the Papers Left the Department with Lawful Possession, Custody and Control of the Papers

At the point when petitioner, Secretary of State and custodian of the Department's papers, 22 U.S.C. § 2657, first asserted an interest in the notes adverse to the known, potential interest of the Department (as, for example, when he removed the notes to the Rockefeller home in October 1976), he became a constructive trustee of the notes for the Department.

> A constructive trust
>
> arises not by any agreement or understanding of the parties but by operation of law and is imposed upon grounds of public policy, to prevent a person from holding for his own benefit that which he has gained by reason of a special trust or confidence reposed in him by an innocent party.

County of Cook v. Barrett, 36 Ill. App. 3d at 627, 344 N.E.2d at 545. Constructive trust is "a strict equitable doctrine applied to cure a fiduciary's breach of his duty of loyalty by erasing the source of his conflict of interest, and transferring it to the innocent beneficiary." 36 Ill. App. 3d at 631, 344 N.E.2d at 548. It is imposed on

unless he first advises "the official responsible for [his] appointment" and receives in advance a "written determination" approving his action. The record here does not reflect that either when he first removed the notes to the Rockefeller home in October 1976, A. 247a-248a, or when he had them delivered to the Library of Congress on December 28, 1976, A. 249a, petitioner informed President Ford of the "nature and circumstances." Nor does the record reflect the written approval of President Ford. Petitioner had an obvious "financial interest" in the removal of the notes from the Department and their deposit in the Library of Congress with exclusive access for himself. *See* A. 43a-44a, 46a, 286a, 289a-290a.

whatever a public official may receive or take "through the acquirement of an interest in conflict with his fidelity as an agent." *United States v. Carter*, 217 U.S. at 306. It arises at the moment the adverse interest arises. Bogert, Trusts & Trustees § 471 at 6 (rev. 2d ed. 1978).[7]

Petitioner's subsequent transfer of the notes to the Library of Congress does not affect the Department's rights under the constructive trust. The Department, the innocent beneficiary, "has a full right to follow such property into the hands of such third person." *Oliver v. Piatt*, 44 U.S. (3 How.) 333, 401 (1845); *cf. Sterling v. Blackwelder*, 383 F.2d 282, 284 (4th Cir. 1967). The constructive trust attaches to the notes themselves *in specie*. Restatement of Restitution § 201(1)(1937); Bogert, Trusts & Trustees § 866 at 47-48. This is particularly the case where the property, as here, is unique.

Moreover, petitioner did not in fact relinquish possession of the notes when he transferred them to the Library of Congress.[8] His deed of transfer reserved to himself "both the power and the intention to exercise dominion over" the notes, "either directly or through another

[7]The court must give expression to the idea that the defendant has been under an equitable duty to give the complainant the benefit of the property ever since the defendant began to hold unjustly, by holding that the defendant has since the inception been in the same position as if he had been an express trustee of the property for the complainant. To reach the result desired, the rights and duties of the parties are to be the same as if the defendant had been, from the beginning of his inequitable holding, an express trustee for the complainant. To obtain this end the court constructs a trust and makes the defendant a trustee by decree of the court for the purpose of working out justice. Bogert, § 471 at 6-7.

[8]The Federal parties' brief suggests a question not heretofore considered. What happened to the notes that were not transcribed until after the first shipment to the Rockefeller estate? What

[footnote continued]

person." *United States v. Figueroa*, 337 F.Supp. 645, 650-51 (S.D.N.Y. 1971). He reserved exclusive access to himself and his designees. He reserved the right to exclude all others, even Library employees whom he did not approve, for 25 years or until five years after petitioner's death. A. 43a-44a. Therefore, even though petitioner physically deposited the notes in the Library, the notes remained "under his control," "in a place where [they were] put by his act or in his behalf" and were "within his power in such a sense that he can and does command [their] use." 63 Am. Jur. 2d *Property* § 39 (1972). As Mr. Justice Holmes succinctly put it, "[w]hen there is conscious control, the intent to exclude and the exclusion of others, with access to the place of custody as of right, there are all the elements of possession in the fullest sense." *Union Trust Co. v. Wilson*, 198 U.S. 530, 537 (1905).[9]

happened to those not transcribed until after the second shipment to the Library? *See* F. Br. 23, 52. Moreover, the record is silent on the timing of petitioner's transfer vs. respondent's request. The request was delivered by hand on December 28, 1976, A. 69a, but the record does not reflect the hour of receipt. The notes were shipped from the Rockefeller estate to the Library of Congress on December 28. The record does not reflect the hour of receipt at the Library or whether the trucks were government trucks, were paid for by the State Department, by petitioner, or by Vice-President Rockefeller.

[9]One analogy is the definition of a bankrupt's possession of property that is sufficient to vest a bankruptcy court with summary jurisdiction of the property. Taubel-Scott-Kitzmiller Co. v. Fox, 264 U.S. 426, 432-33 (1924). There is sufficient possession "where the property is in the hands of the bankrupt's agent or bailee." *Id.* (Here the Library was Secretary Kissinger's agent or bailee.) It is found "where the property is held by some other person, who makes no claim to it." *Id.* (Here the Library did not oppose respondents' motions for summary judgment in the district court, did not appeal the judgment and takes an equivocal position here. Aside from the remark that it "desires to keep the notes," it makes no claim for the notes, apparently because of the position of the Archivist of the United States, who does not possess the documents but who does claim them; F. Br. 12, 14-16, 18 and nn. 11, 14.)

Nor could petitioner effectively "donate" the notes to the United States. These were papers that he already held as custodian for an agency of the United States. He could only assert ownership of them by a violation of his fiduciary duty. He may not thereby defeat the public's rights under the FOIA.

These notes were not only held "in trust for all the people . . .," *United States v. California,* 332 U.S. 19, 40 (1947), but were subject to express statutory rights of public access. "[O]fficers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act." *Id.* at 40 (footnote omitted). Here Secretary of State Kissinger had no authority at all to dispose of property in violation of his trust. His assertion of ownership and transfer of the notes could not cause the Department to lose its lawful rights of possession, nor the public to lose its rights under the FOIA. *Cf. United States v. California,* 332 U.S. at 40. When the State Department, having an absolute right to the notes, denied access to them, it withheld them under the FOIA and the district court properly exercised equitable power to give effect to respondent's rights under the FOIA.

III.

THE DISTRICT COURT CORRECTLY HELD IT HAD EQUITABLE POWER TO ORDER THE NOTES RETURNED TO THE STATE DEPARTMENT

In holding that it had equity power to order the return of wrongfully removed agency documents, the district court cited both the FOIA and *Renegotiation Board v. Bannercraft Clothing Co.,* 415 U.S. 1, 19 (1974). The *Bannercraft* citation refers to this Court's declaration that the FOIA's express grant of injunction power did not

limit other inherent powers of an equity court, noting the Court's earlier recognition of broad equity power and citing the All-Writs Act, 28 U.S.C. § 1651(a).

Petitioner and the Federal parties miscast the district court's holding into the implication of a novel private remedy to force retrieval of documents—a kind of implied derivative cause of action, *see* Pet. Br. 23, 25; F. Br. 29-35.

A.

The District Court's Order Was Authorized as a Proper Way to Enforce the Statute

The FOIA expressly supports the district court's order. It empowers district courts "to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B). The parties subject to such order are not limited to the withholding agency. The same section also empowers the district court "to enjoin the agency from withholding agency records." The two provisions together are a grant of power ample to support the district court's order.

That the statute does not go further to specify that the court may issue orders to third parties who wrongfully detain records does not defeat the court's power to do so. This Court has often affirmed that kind of power.

In *United States v. Mississippi Valley Generating Co.* the issue was whether a contract could be invalidated because one of the individuals involved in its negotiation had a conflict of interest in violation of the predecessor to 18 U.S.C. § 208. The Court, noting that the section, a criminal statute, "does not specifically provide for invalidation of contracts," stated that "the inquiry must be whether the sanction of nonenforcement is consistent with and essential to effectuating the public policy

embodied" in the statute. 364 U.S. at 563. It found that the remedy was not novel, *id.* at 564, and that even if the result might seem harsh the remedy was "dictated by the public policy manifested by the statute" and "required in order to extend to the public the full protection which Congress decreed by enacting" the section, *id.* at 565-66. Here too the district court's remedy was not novel and was "essential to effectuating the public policy embodied in" the Freedom of Information Act.

In *United States v. Acme Process Equipment Co.*, 385 U.S. 138 (1966), the Court extended *Mississippi Valley*'s authorization of broad remedial power to another statute which provided certain specific civil remedies. The defendant had argued that the statutory remedies were exclusive. The Court found it "natural for Congress to provide this express remedy" but found no "indication . . . that Congress, in providing a civil remedy for a more tangible evil, intended to preclude other civil sanctions necessary to effectuate the purpose of the Act." 385 U.S. at 145.

In *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), the statute provided for enforcement of rent control by injunction against violations, "or other order." The district court enjoined the future collection of excess rents, but denied the traditional equitable remedy of restitution of back excess rents.

The Court reversed, holding that restitution was a proper remedy. The district court's equitable jurisdiction derived from the express injunction power. The Court held:

> Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake.

328 U.S. at 398. As in *Porter*, here the respondents' FOIA interest is a uniquely public interest.

Moreover, as in the *Porter* statute, the general word "order" appears in the FOIA. This "contemplates a remedy other than that of an injunction or restraining order, a remedy entered in the exercise of the District Court's equitable discretion." *Id.* at 399. The court's duty in framing such remedies is "primarily to effectuate the policy of the [statute] and to protect the public interest while giving necessary respect to the private interests involved." *Id.* at 400. The district court's order here does exactly that. It protects the public interest in disclosure of agency records under the FOIA, while giving petitioner and others the right to participate in the release procedures to prevent release of material affecting their private interests.

Porter was in turn extended in *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288 (1960). There the Fair Labor Standards Act prohibited discharge of an employee for filing a complaint of violation, granted jurisdiction to restrain violations but expressly withdrew jurisdiction to order payment of wages unpaid in violation of the Act. The issue was whether the district court could nevertheless order reimbursement of wages lost by an unlawful discharge. 361 U.S. at 290. The Court held that the remedy was proper.

The Court quoted extensively from *Porter*, 361 U.S. at 291, and went on to hold that it was unnecessary for the language of the statute to express (as it did in *Porter* and does here) "affirmative confirmation" of equitable power:

> When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in the light of statutory purposes. As this Court long ago recognized, "there is inherent in the Courts of Equity a jurisdiction to * * * give effect to the policy of the legislature."

Id. at 291-92 (citation omitted).

The principle that runs through these four cases applies here. The district court had and exercised equitable power to effectuate the policy of and to grant a complete remedy to enforce the FOIA. Nothing in the FOIA limits that power; indeed, the statutory language encompasses it. The district court's order was proper.

B.

The All-Writs Act Grants the Authority the District Court Exercised

The passage in *Bannercraft* which the district court cited invokes the All-Writs Act, 28 U.S.C. § 1651(a). The All-Writs Act grants power to federal courts "to issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." Here the district court's complete exercise of jurisdiction under the FOIA, *see* I, *supra*, required it to order the documents returned to the Department of State, for the court's eventual determination of the propriety of their release to the respondents.

The Court's most recent application of the All-Writs Act is in *United States v. New York Telephone Co.*, 434 U.S. 159 (1977). There it reversed the Second Circuit's holding that the All-Writs Act did not empower a district court to order the telephone company, a third party stranger to the proceeding, to assist the FBI to install a "pen register," an investigative device held authorized

under Rule 41(b), Fed. R. Crim. P. 434 U.S. at 171. The Court declared:

> This Court has repeatedly recognized the power of a federal court to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained: "This statute has served since its inclusion, in substance, in the original Judiciary Act as a 'legislatively approved source of procedural instruments designed to achieve the rational ends of law.'" . . . Indeed, "[u]nless appropriately confined by Congress, a federal court may avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it."

Id. at 172-73 (citations omitted).

The Court found it crucial that the burden on the telephone company was not unreasonable, that the telephone company was a regulated public utility "with a duty to serve the public," and that its assistance was indispensable to the FBI's fulfillment of its lawful function. 434 U.S. at 171-78. Here the assistance of the Library of Congress is crucial, for the Library has physical possession of the records. The Library is a government supported public facility with a duty to serve the public. The records are in one location and need be moved only across the city. The burden of transferring the documents is not unreasonable. In sum, *New York Telephone* establishes the district court's power under the All-Writs Act to order the Library to return the notes to the Department of State.[10]

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[10] In *New York Telephone* the Court cited three older decisions that in varying ways also demonstrate the applicability of the

[footnote continued]

IV.

THE DISTRICT COURT CORRECTLY HELD THAT THE NOTES ARE AGENCY RECORDS WITHIN THE MEANING OF THE FOIA

A.

The Asserted State Department Determination That the Notes Are Not Agency Records Is Subject to De Novo Review

Petitioner argues that what he describes as a State Department "decision that the notes were not its records," Pet. Br. 39, was entitled to deference unless it was "arbitrary, capricious, or an abuse of discretion." *Id.* 41.

First, the "decision" cannot be divorced from petitioner's breach of trust and conflict of interest and as such may be void *ab initio*. *See* pp. 10-12, *supra*. In any event, petitioner's argument ignores the plain words of the FOIA.

Whether records are agency records is an issue for court decision under the FOIA, like any other issue; *see* cases cited at pp. 7-8 and 8 n.3, *supra*. As such the district court is to "determine the matter de novo." 5 U.S.C.

All-Writs Act to this case. In United States v. McHie, 196 F. 586 (N.D. Ill. 1912), the Act was found to support power to impound documents belonging to an innocent third party. Use of the All-Writs Act as basis for interrogation of third parties in an inquiry into bail arrangements of a fugitive was upheld in United States v. Field, 193 F.2d 92 (2d Cir. 1951), *cert. dismissed*, 342 U.S. 908 (1952), *quoting* an earlier opinion by Mr. Justice Reed sitting as Circuit Justice, 193 F.2d at 96. The Act was cited as authorizing an order to a third party to ensure the carrying out of an ICC order, Mississippi Valley Barge Line Co. v. United States, 273 F.Supp. 1, 6 (E.D. Mo. 1967), *aff'd*, 389 U.S. 579 (1968). *See*, for citations, 434 U.S. at 174.

In another case, Hamilton v. Nakai, 453 F.2d 152 (9th Cir. 1971), the All-Writs Act was held to authorize an order allowing an Indian tribe to enter onto land to which the tribe had a lawful right as cotenant. The court noted that "powers under § 1651(a) should be broadly construed." 453 F.2d at 157.

§ 552(a)(4)(B). This language was written into the act precisely to foreclose petitioner's argument. "That the proceeding must be de novo is essential in order that the ultimate decision as to the propriety of the agency's action is made by the court and prevent it from becoming meaningless judicial sanctioning of agency discretion." S. Rep. No. 813, 89th Cong., 1st Sess. (1965), *reprinted in* S. Doc. No. 93-82, Freedom of Information Act Source Book: Legislative Materials, Cases, Articles, 93d Cong., 2d Sess. at 43 (1974) (hereinafter *Source Book*); *accord*, H.R. Rep. No. 1497, 89th Cong., 2d Sess. (1966), *Source Book* at 30.

B.

The Notes Are Agency Records Within the FOIA

Petitioner assumes that the Federal Records Act and Department regulations implementing the Federal Records Act (Pet. Br. 35-39) control what must be disclosed under the FOIA. The Federal parties admit that some materials not "records" under the Federal Records Act may nevertheless be subject to FOIA disclosure, F. Br. 49-52. Neither, however, looks to the intent of Congress as embodied in the FOIA itself for guidance about what are agency records under that statute.

The focus of the statute, as its title makes plain, is "information." Of course the information must be recorded, but nevertheless the principle of the Act is "the people's right to know." *See, e.g.*, H.R. Rep. No. 1497, *Source Book* at 23; 27 ("the right of the individual to be able to find out how his government is operating"); 33; S. Rep. No. 813, *Source Book* at 37-38 ("a people who mean to be their own governors, must arm themselves with the power knowledge gives," *quoting* Sen. Long of Missouri *quoting* James Madison); 38 ("a broad philosophy of 'freedom of information' ").

The purpose of the FOIA is to provide maximum information to the public about the operations of government. In signing the FOIA President Johnson commended it as springing "from one of our most essential principles: a democracy works best when people have *all* the information that the security of the nation permits." *Source Book* at 1 (emphasis added). The Act promotes "maximum feasible access by private persons to the internal details of administration. . . ." *The Freedom of Information Act, Hearings on H.R. 5425 and 4960 Before a Subcommittee of the House Committee on Government Operations,* 93d Cong., 1st Sess. 102 (1973) (prepared statement of Assistant Attorney General, Office of Legal Counsel). The Act "presumed the public availability of *all* government information." 1 *Executive Privilege, Secrecy in Government, Freedom of Information, Hearings on S. 858 (etc.), Before the Subcommittee on Intergovernmental Relations, Senate Committee on Government Operations, et al.,* 93d Cong., 1st Sess. 183 (1973) (statement of Rep. William S. Moorhead) (emphasis in original).

The same purpose informed the 1974 amendments to the FOIA. H.R. Rep. No. 92-1419, 92d Cong., 2d Sess. (1972), *reprinted in* Senate Judiciary Comm., Freedom of Information Act and Amendments of 1974 (Pub. L. 93-502) Source Book, 94th Cong., 1st Sess. (Joint Comm. Print 1975) (hereinafter *Amendments Source Book*) at 12 ("the people must know in detail the activities of government," *quoting* the Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act (1967)); 20 ("everything should be public . . . the burden is on the Government to defend its non-disclosure of public business," *quoting* Rep. Moorhead); H.R. Rep. No. 93-876, 93d Cong., 2d Sess. (1974), *Amendments Source Book* at 123; S. Rep. No. 93-854, 93d Cong., 2d Sess. (1974), *Amendments Source Book* at 153-54:

> Recognition of the people's right to learn what their government is doing through access to government information can be traced back to the early days of our Nation. Open government has been recognized as the best insurance that government is being conducted in the public interest, and the First Amendment reflects the commitment of the Founding Fathers that the public's right to information is basic to the maintenance of a popular form of government. Since the First Amendment protects not only the right of citizens to speak and publish, but also to receive information, freedom of information legislation can be seen as an affirmative congressional effort to give meaningful content to constitutional freedom of expression. Moreover, to exercise effectively all their First Amendment rights, the people must know what their government is doing.

Id. at 157 ("make information available to the public"). *See also* F. Br. 51 and 51 n.38.

In sum, the simple test of the FOIA is that agency records include any papers dealing in whole, and that portion of papers dealing in part with "public business"; papers reflecting "in detail the activities of government," papers whose disclosure will let the "people . . . know what their government is doing."

Under this test the notes are agency records. They "were made in the course of Kissinger's official duties for the purpose of recording agency business and assisting him and other government employees in discharging their official responsibilities. . . ." F. Br. 22; *see* F. Br. 42-43. Petitioner confirms that the notes record the business of government. He testified that his State Department aides reviewed the notes for such purposes as preparing his "appointments schedule," keeping "abreast of [his] activities" and determining "whether any matters [he] had discussed required follow-up or implementation."

A. 245a. The notes include "discussions of official business" with, *inter alia*, "diplomats, government officials" and "two Presidents." Many of the recorded conversations were "formal business conversations." *Id.*; *see* A. 148a-149a.

The notes recording telephone conversations were for the Secretary of State a "convenient and appropriate mode of discharging the duties of his office. . . ." Therefore it was

> not only his right but his duty to keep that memorial, whether expressly required so to do or not; and when kept it becomes a public document—a public record belonging to the office and not the officer; is the property of the state and not of the citizen, and is in no sense a private memorandum.

Coleman v. Commonwealth, 66 Va. (25 Gratt.) 865, 881 (1874). The records are "public records . . . 'because the entries in them are of public interest . . . and because they are made under the sanction of an oath of office, or at least under that of official duty.'" *Id.* at 882, *quoting* 1 Greenleaf's *Evidence* § 484. A written record of a transaction in public office made by a public officer is a public record of the office, not the personal property of the holder of that office. *See, e.g., Public Affairs Associates, Inc. v. Rickover*, 109 U.S. App. D.C. 128, 284 F.2d 262 (1960), *rev'd on other grounds*, 369 U.S. 111 (1962), *on remand*, 268 F.Supp. 444 (D.D.C. 1967); *Robison v. Fishback*, 175 Ind. 132, 93 N.E. 666 (1911). *See also Sandy White v. United States*, 164 U.S. 100, 103 (1896) (public officials who keep written materials in the discharge of their official duties are considered to be keeping public records, not private memoranda, whether or not the statutory law demands that they actually do so).

In short it is the character, content and use of the materials which controls.

> To hold that a document received by an agency and actually used by it in agency decision-making is not an agency record for purposes of the Act . . . would seriously undermine one of the central purposes of the Act: to allow the public to become informed on the bases for agency decisions and actions.

Tax Reform Research Group v. IRS, 419 F.Supp. 415, 425 (D.D.C. 1976). This distills into a sentence the clear intent of Congress. The notes are agency records under the FOIA.

C.

The Remand Suggested by the Federal Parties Is Unnecessary

The Federal parties suggest a sort of compromise judgment. They suggest a remand to determine if the extracts petitioner permitted to be made from his notes sufficiently reflect the governmental business recorded in the notes. F. Br. 23, 46-49. They recognize, however, that this would not resolve the conflict between the State Department and the Archivist of the United States. The Archivist insists on retention of originals, no matter what the extracts reflect. F. Br. 12-13, 23.

Respondent seeks, and the FOIA reaches, only those portions of the notes which record government business, not personal matters. If the extracts are indeed a faithful, precise, complete and *verbatim* record of all of those portions, their disclosure may well satisfy the FOIA, if not the Archivist.

The procedure already ordered by the district court is appropriate to determine this, as well as to require additional disclosure to supplement the extracts to the extent they are not a complete and exact transcription of the government business recorded in the notes. Affirmance

of the district court's decision and its order will let the examination and processing of the notes proceed.

The Federal parties lay great stress on agencies' need to be able to dispose of unneeded records in a regular way. They argue that affirmance of the judgment below would disrupt agencies' records management. F. Br. 19, 33-34, 40 n.28.

The fear ignores the unique aspects of this case. The documents at issue here are the work product of the head of the agency himself. He himself removed them from the agency in violation of his trust. Recognition that their removal was wrongful and ordering their return will not affect the regular "disposal of millions of agency records annually." F. Br. 19. Affirmance of the judgment below will set a precedent only for officials of petitioner's rank, that decisions respecting the disposal of original records of government business may not be made by them for their own benefit.

The answer to the question what should petitioner have done is simple. He could have made photo copies of the notes for his own use, A. 263a, and donated the copies to the Library of Congress. He could, and should, have left the decision respecting disposition of the originals to his successor.

V.

INSPECTION AND PROCESSING OF THE NOTES UNDER THE DISTRICT COURT'S ORDER INVADES NO CONSTITUTIONAL RIGHT OF PETITIONER

Petitioner's argument on this point is disposed of by *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977). Respondent adopts the argument of the Federal parties beginning with the second full paragraph on F. Br. 56 to the top of *id.* 58.

CONCLUSION

The judgment below in No. 78-1088 should be affirmed.

Respectfully submitted,

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